SOH KAH WAI

v.

DATUK HIEW NYUK YIN

HIGH COURT BORNEO, TAWAU
ABU MANSOR ALI J
[CIVIL SUIT NO. T. 208 OF 1986]
8 OCTOBER 1987

CIVIL PROCEDURE: *Application to strike out defence - Order 18 rr. 19(1)(b) and (c) of the Rules of the High Court 1980 - Effect of different versions presented by the plaintiff and defendant.*

By a summons-in-chambers the appellant-plaintiff applied to strike out the respondent-defendant's defence under O. 18 rr. 19(1)(b) and (c) of the Rules of the High Court 1980 on the ground that it was scandalous, frivolous or vexatious or it would prejudice, embarrass or delay the fair trial of the action and/or it was otherwise an abuse of the process of the Court and if successful that judgment be entered against the defendant. The plaintiff and defendant both filed affidavits and counter affidavits alleging and denying certain facts.

Held:
It was not plain and obvious on the totality of the matter that the defence should be summarily dismissed without permitting the defendant to proceed to trial. The power of summary dismissal was a drastic power and should not be exercised except in plain and obvious cases. There existed a number of matters of fact on which the plaintiff and defendant expressed different versions. These issues could only be settled by calling witnesses and decided after a trial. The matter was far from obvious and the proper forum for solving the various issues was at a proper trial.

[Application Dismissed.]

Case referred to:
Lee Nyan Choi v. Voon Noon [1979] 2 MLJ 28

Legislation referred to:
Rules of the High Court 1980, O. 18 rr. 19(1)(b), (c)

For the plaintiff - Chung Chew Chan; M/s. Wong Yapp Chung & Co.
For the defendant - Priscilla Ruth Markus; M/s. Maringking Ho & Co.

JUDGMENT

Abu Mansor Ali J:

By the summons-in-chambers dated 5 September 1987. the appellant/plaintiff applied to strike out the respondent/defendant's defence under O. 18 rr. 19(1)(b) and (c) of the Rules of the High Court 1980 on the ground that it is scandalous, frivolous or vexatious or it may prejudice, embarrass or delay the fair trial of the action and/or it is otherwise an abuse of the process of the Court and if successful that judgment be entered against the defendant.

I had this matter adjourned to open Court on 8 October 1987 and after hearing the plaintiff I dismissed the plaintiff's application without hearing the defence Counsel relying only on affidavits filed by the defence.

a In support of his application the plaintiff filed an affidavit in support - encl. (9A) - and in reply to encl. (9A) the defendant filed an affidavit in opposition - encl. (10). In reply to matters stated in encl. (10) the plaintiff filed encl. (12). All affidavits were read and referred to by the Counsel for plaintiff in detail in open Court. As such I did not find it necessary that I should hear the defence Counsel before arriving at my decision to dismiss plaintiff's application with cost.

b Turning to the arguments of plaintiff's Counsel, she applied that paras. 2, 3, 4 and 5 of the statement of defence be struck out. In para. 2 of the statement of defence - encl. (4) - the defendant denies para. 9 of the statement of claim wherein plaintiff claimed defendant failed to make any payment to the plaintiff for the precontract consultancy services rendered at 30% of the alleged agreed sum of 7% of the total building costs as per particulars stated in para. 10 of the claim. In the said para. 10 of the said claim the plaintiff claimed he suffered *c* loss and damages in the sum of RM67,200 particularised as follows:

Proposed Office on TL.576 and TL.577
Jalan Bakau/Jalan Wing Lok, Tawau

d Overdue 1st interim payment of professional fees for preparing and submission of building plans for proposed office building for approval by the said council estimated building Costs	RM3,200,000
agreed fees @ 7% of the total building costs	RM 224,000
	RM 67,200

e In the said para. 2 of the defence the defendant also will aver that the fees agreed between him and Mr. Wong Pin Khen, a partner of Sabah Building Consultants, the firm commissioned by him to provide consultancy services, from whom the plaintiff took over as prime consultants was 6.75% of construction cost and not 7%.

The plaintiff in paras. 2 and 3 of his affidavit-encl. (9A) referred to this para. 2 of the defence and say that the agreed fees was 7% and not 6.75% of total building costs. In his contention *f* the plaintiff relied on Exhibit SKW1 which was a letter from plaintiff to the defendant dated 9 August 1983 stating that plaintiff has reduced the original fee of 8.5% to 7% of total building cost. The plaintiff contends that he has tendered several bills to the defendant claiming the amount from June 1984 (Exhibit SKW2) to March 1986. Plaintiff contends that defendant is estopped from disputing that the fees was 7% of total building cost. For the defendant, however, in para. 3 of his affidavit - encl. (10) - he contends that the last sentence of said *g* letter SKW1 "We hope you will accept our revised fee considerately" clearly shows that the fees of 7% had not been agreed to by the parties. The defendant contended if in fact the fees had been agreed why the necessity to ask for his consent?

As regards the 12 number of storeys agreed to be built alleged by the defendant in para. 2(i) of encl. (11) the plaintiff replied in para. 5 of encl. (12) that the defendant was only licensed *h* to build 12 storey only. The Court accepts that there is no dispute that only 12 storey was to be built.

Still on para. 2 of the statement of defence in answer to para. 3(i) of encl. (10) that neither the 7% professional fees nor the estimate of the building cost has been mutually agreed and to the defendant's allegation that he had made telephone calls to the plaintiff to object to them the plaintiff in para. 3(iii) of encl. (12) denied that such telephone calls were ever made *i*

and contended that the objections should have been in writing. The plaintiff also say that they rely on Exhibit SKW1 in reply and say that this is the first time it was raised that the fees was 6.75% and not 7%.

The plaintiff then applies that para. 3 of the statement of defence be struck out. In para. 3 of the statement of defence (4) the defendant contends that the fees of 6.75% includes and is apportioned amongst architectural, civil and structural engineering, mechanical and electrical engineering services. The defendant in this paragraph contends that only architectural service was so far rendered and even that was up to development design stage only. As regards this defence in para. 3 of encl. (9A), the plaintiff contended that not only 45 structural drawings, 6 mechanical and electrical drawings have been completed by System Consult. In encl. (12) the plaintiff exhibited drawings SKW1 to SKW6 the drawings that have been reduced to scale. As to defendant's allegation in para. 4 of encl. (10) that there is no evidence that System Consult had completed 45 numbers of structural drawings and the defendant denying that 30% of the total agreed fees is now due but he agreed to pay 30% of the fees which is apportioned exclusively for architectural service (i.e. for service up to development design stage) and RM10,000 of it had already been paid, the plaintiff in paras. 5(i), (ii), (iii) of encl. (9A) answered to the effect that the plaintiff as prime consultants had engaged the services of sub-consultants like the civil and structural engineers, as such the defendant could not say that he is only liable to 30% of the fees which is apportioned for structural services only. The plaintiff was at that stage already liable to sub-consultants. The plaintiff says that he had no knowledge of the alleged payment of RM10,000 in para. 6(1) of encl. (12), says as the Exhibit HWY3 did not bear any detail it could be for anything.

Then lastly the plaintiff prayed that para. 5 of the statement of defence be struck out. Paragraph 5 of the defence says that the building cost estimated by the plaintiff at RM3,200,000 was grossly exaggerated and will contend that the total cost will be less than RM2,000,000. In support of plaintiff's application in para. 6(i) of encl. (9A) the plaintiff put the defendant to strict proof. In para. 6(ii) of (9A) the plaintiff contends that the building cost of RM3.2 million was obtained after a meeting at the Hotel Capital, Kota Kinabalu, in August 1983 attended by his partner and the defendant. In support of his allegation plaintiff exhibited SKW4.

The plaintiff cited several authorities on the point of striking out under O. 18 r. 19 which are relevant. It is correct to say that the authorities on the point are all settled. In *Lee Nyan Choi v. Voon Noon* [1979] 2 MLJ 28, 29 the Federal Court in a case of striking out of statement of defence said: "The power to dismiss an action summarily without permitting a party to proceed to trial is a drastic power and should be exercised with utmost caution. The power of summary procedure should only be resorted to in plain and obvious cases." It would appear that the plaintiff's Counsel was aware of this authority.

After having considered this matter as a whole before me I cannot say that it was plain and obvious that I can summarily dismiss without permitting the defendant to proceed to trial. There are certainly points of defence which only a trial and leading of evidence by both sides and correct evaluation of that evidence by a trial Court and can finally settle the issues raised.

Firstly, there was the disagreement of parties as to whether fees should be 7% or 6.75% of total cost of building. I find that only evidence and proper submission by Counsel and a decision of the trial Court can settle this issue.

Then there is the issue how many drawings both structural and mechanical were really complete. The defendant does not appear to accept that the drawings said to have been completed by the plaintiff were in fact completed. This is another area where it is only the trial Court can decide after proof.

Then lastly, the biggest area of difference between the parties is the 30% of fees which according to the defendant is for structural services only and the plaintiff saying 30% of total agreed fees. And even assuming that the fees is 7% of total cost of building it is for the plaintiff to prove that the building cost is RM3.2 million and not as alleged by defendant below RM2 million. The issue can only be settled by the calling of witnesses who were present at the meeting and may involve the calling of quantity surveyors to give the Court a guide and to enable the Court to say that the building costs at that date was RM3.2 million. The plaintiff's producing of Exhibit SKW4 consisting of figures which the Court is not competent to construe and in no way help the Court to decide as to what figure was actually agreed. To accept SKW4 would be to make guess work of the figures in it.

Taking the matter as a whole. I had no hesitation in saying that the matter is far from obvious. The proper forum for solving the various issues is at a proper trial and I therefore dismissed the plaintiff's application with cost. The plaintiff appeals.

Also found at [1988] 2 CLJ 326